

Decision 05-03-028 March 17, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion into Competition
for Local Exchange Service.

Rulemaking 95-04-043
(Filed April 26, 1995)

Order Instituting Investigation on the
Commission's Own Motion into Competition
for Local Exchange Service.

Investigation 95-04-044
(Filed April 26, 1995)
**(FCC Triennial Review
9-Month Phase)**

**OPINION CONFIRMING THE ASSIGNED COMMISSIONER
RULING DENYING IN PART AND GRANTING IN PART MOTIONS FOR
CONTINUATION OF UNBUNDLED NETWORK ELEMENT PLATFORM**

I. Summary

This order confirms the March 11, 2005 Assigned Commissioner's Ruling (ACR) denying in part and granting in part the motions for continuation of the unbundled network element platform (UNE-P), as filed on March 1 and March 2, 2005, respectively, described as follows.

On March 1, 2005, a joint motion was filed by MCI, Inc.,¹ The Utility Reform Network (TURN), Blue Casa Communications, Inc. Wholesale Air-Time, Inc. Anew Communications Corp d/b/a Call America, TCAST Communications, and CF Communications LLC d/b/a Telekenex (Joint Movants). Each of the

¹ MCI indicated its withdrawal from the motion on March 15, 2005, on the basis that MCI has subsequently negotiated a commercial agreement with SBC.

Joint Movants (except for TURN) are competitive local exchange carriers (CLECs) that have Interconnection Agreements (ICAs) with Pacific Bell Telephone Company (Pacific), by and through its parent company, SBC Communications (SBC). Each of the ICAs (patterned after the ICA between MCI and Pacific) provides that Pacific shall provision unbundled network elements (UNEs) in combinations, including the “UNE Platform (UNE-P).

The Joint Motion was filed in response to SBC’s announcement that, beginning on March 11, 2005, it would reject all orders for new lines utilizing UNE-P and would also stop processing requests for moves, adds, and changes for each CLEC’s existing UNE-P customer base. SBC made this announcement pursuant to its interpretation of the legal effect of the Federal Communication Commission’s (FCC) recently issued Triennial Review Remand Order (TRRO), released February 4, 2005.

Joint Movants seek a Commission order forbidding SBC from rejecting such UNE-P orders pending compliance with the change of law provisions in the respective ICAs. Joint Movants claim that affected CLECs will be unable to place UNE-P orders in California after March 10, 2005, absent Commission action to forbid SBC from rejecting such UNE-P orders pending compliance with the change-of-law provisions in their respective interconnection agreements. Unless such Commission action is taken, Joint Movants claim that CLECs would sustain immediate and irreparable injury because they will be unable to fill service requests for existing and new UNE-P customers.

On March 2, 2005, DMR Communications and Navigator Telecommunications, LLC (collectively Small CLECs) filed a similar motion entitled “Motion for an Order Requiring SBC to Comply With Its CLEC Interconnection Agreements.” The motion presents allegations and seeks relief

essentially similar to that requested in the Motion filed in this same proceeding on March 1, 2005, by MCI, Inc. *et. al.* The DMR ICA is patterned after the AT&T ICA, except for its reciprocal compensation provisions. The Navigator ICA was approved in Resolution T-16524. Both the DMR and Navigator ICAs contain provisions for negotiation and dispute resolution for change of law provisions similar to those patterned after the MCI ICA.

As summarized in the ACR, parties were provided the opportunity to fully brief issues pertinent to a ruling on the respective motions. The assigned commissioner issued the March 11, 2005 ACR after all affected parties had fully briefed the motions, including offering supporting declaration.

II. Confirmation of the ACR

A copy of the ACR is attached as Appendix A hereto. We hereby confirm the ACR in accordance with the provisions of Pub. Util. Code § 310 which states, in part:

“Every finding, opinion, and order made by the commissioner or commissioners so designated, pursuant to the investigation, inquiry, or hearing, when approved or confirmed by the commission and ordered filed in its office, is the finding opinion and order of the commission.”

Because the ruling is attached to this decision, we do not repeat its full contents. In brief, the ACR affords parties additional time to negotiate the applicable ICA amendments necessary to transition and to continue to serve the CLECS embedded customer base as contemplated by the TRRO. The ACR accordingly directs SBC to continue processing CLEC orders involving additional UNE-Ps for the embedded base of customers who already have UNE-Ps, until no later than May 1, 2005. SCB is directed to not unilaterally impose those provisions of the accessible letter that involve the embedded customer base until the company has either negotiated and executed the

applicable interconnection agreements with the involved CLECs or May 1, 2005 has been reached. During this negotiation window, all parties are instructed to negotiate in good faith interconnection agreement amendments to implement the FCC ordered changes. Commission staff is empowered to work with the parties to ensure that meaningful negotiations take place consistent with the FCC's directive to monitor the negotiation process to ensure that the parties do not engage in unnecessary delay.

The ACR, however, also concluded that under the terms of the TRRO, for new CLEC customers seeking new serving arrangements, UNE-P is unavailable as of March 11, 2005. The ACR determined, therefore, that the SBC accessible letter for the replacement of UNE-P may take effect on March 11, 2005 with respect to service offerings to new CLEC customers. The ACR also directed the parties to proceed expeditiously with good faith negotiations toward amending their interconnection agreements in accordance with the TRRO.

III. Comments on Draft Decision

This is an unforeseen emergency in that the request for relief is based on extraordinary conditions in which time is of the essence. (*See* Rule 81(f) of the Commission's Rules of Practice and Procedure.) We therefore waive the 30-day period for comments on draft decisions set forth in Pub. Util. Code § 311(g)(1) as well as the comment period in Rule 77.7. (*See* also Pub. Util. Code § 311 (g)(2) and Commission's Rules of Practice and Procedure 77.7 (f)(1).

IV. Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Thomas R. Pulsifer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The March 11, 2005 ruling on the Joint Parties' Motions, as set forth above, was made after full briefing.
2. The motion resolves disputes concerning SBC's announcement that, beginning on March 11, 2005, it would reject all orders for new lines utilizing UNE-P and would also stop processing requests for moves, adds, and changes for each CLEC's existing UNE-P customer base.
3. SBC made this announcement pursuant to its interpretation of the legal effect of the Federal Communication Commission's (FCC) recently issued Triennial Review Remand Order (TRRO), released February 4, 2005.
4. The ACR affords parties additional time until May 1, 2005 to negotiate the applicable ICA amendments necessary to transition and to continue to serve the CLECS embedded customer base as contemplated by the TRRO.
5. The ACR also determined that the SBC accessible letter for the replacement of UNE-P may take effect on March 11, 2005 with respect to service offerings to new CLEC customers.
6. This is an unforeseen emergency situation in that the request for relief is based on extraordinary conditions in which time is of the essence.

Conclusions of Law

1. The March 11, 2005 ruling on the Joint Parties' Motions resolves the issues brought before the Commission relating to disputes over SBC's obligations on and after March 11, 2005 to continue offering UNE-P for new customers and for additions or other changes to lines for existing UNE-P customers.
2. The March 11, 2005 ruling is consistent with the TRRO, and accordingly should be affirmed by the Commission in accordance with Pub. Util. Code § 310.

3. The 30-day period for comments on draft decisions set forth in Pub. Util. Code § 311(g)(1) as well as the comment period in Rule 77.7 should be waived in view of the fact that the ACR involves an unforeseen emergency situation.

O R D E R

IT IS ORDERED that the Assigned Commissioner's Ruling denying in part and granting in part the motions for continuation of the unbundled network element platform (UNE-P), attached hereto as Appendix A, is hereby confirmed.

This order is effective today.

Dated March 17, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
SUSAN P. KENNEDY
DIAN M. GRUENEICH
Commissioners

I dissent.

/s/ GEOFFREY F. BROWN
Commissioner

I reserve the right to file a concurrence.

/s/ DIAN GRUENEICH
Commissioner